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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 766

RICHARD C. TURNER, Attorney General of Iowa; DOUGLAS CARLSON, Assistant Attorney General; ROBERT C. BLAIR, Director, Iowa Bureau of Criminal Investigation; DANIEL MAYER, TERRY C. JOHNSON, Agents,

Petitioners,

v.

HENRY WILHELM and LAWRENCE FRANK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

QUESTION PRESENTED

Whether the arrangement by which Petitioners came into possession of Respondents' copy materials constituted an unreasonable seizure requiring an adversary determination of obscenity as a prerequisite thereto.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the First, Fourth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Respondents were the editors and publishers of an underground newspaper known as "Pterodactyl", distributed largely to college persons at Grinnell College at Grinnell, Iowa. Printing of several issues of the newspaper had been done by Trico Publishers, Inc., of Wilton Junction, Iowa. Sometime around the 2nd of March, 1969, Petitioner Carlson, an Assistant Attorney General for the State of Iowa, approached the printer, stated the publication was under investigation and requested to be notified when the next issue was to be printed. The printer called his attorney, who contacted Petitioner Turner, the Attorney General for the State of Iowa, and agreed to alert Turner when the next issue was to be printed. Respondents made arrangements to deliver their copy materials to be printed on the 13th day of March, 1969. This information was relayed to Turner by the printer's attorney. On March 12, 1969, Petitioners Mayer and Johnson, agents of the Iowa Bureau of Criminal Investigation, acting at the request of Turner, through his assistants, presented the printer with a letter requesting the printer to turn over the copy materials to them on the 13th day of March. The letter was signed by Petitioner Carlson. The printer agreed to pretend to Respondents that he was going to print the newspaper as scheduled, secure possession of Respondents' materials, then to deliver them into the hands of Petitioners. The operation went like clockwork. The unsuspecting Respondents delivered the materials to the printer, who then surrendered them to the state agents. The state agents promptly removed the materials to Des Moines, Iowa, where they were photographed and held as "evidence." Respondents' protests and

requests for immediate return of the materials were ignored, as were their claims of prepublication copyright. No search warrant was ever secured; no prior judicial determination of obscenity was had; Respondents' permission for the seizures was not sought or granted; and no criminal charges based on the allegedly obscene materials were ever filed. Respondents filed suit in the United States District Court requesting immediate return of the seized materials and praying for actual and punitive damages. Upon hearing on Petitioners' Motion to Dismiss, the Court found that the arrangement by which Petitioners came into possession of Respondents' copy materials was an illegal seizure, citing *A Quantity of Books v. Kansas*, 378 U.S. 205, 84 S. Ct. 1723, 12 L.Ed.2d 809. The damage suit was dismissed with a finding that Petitioners were within the doctrine of quasi-judicial immunity. The copy was ordered returned and the newspaper was subsequently printed. Both sides appealed to the Circuit Court of Appeals, which upheld the order for the return of the materials. The Court also upheld the dismissal of the damage suit on the grounds Petitioners were acting in good faith. The Circuit Court did not reach the question of quasi-judicial immunity.

ARGUMENT

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

Petitioners allege the decision below is contrary to decisions in the Fourth, Fifth, Seventh and Ninth Circuits. The cases cited in support of that allegation, however, are entirely inappropriate; without exception those cases are criminal appeals in each of which the convicted person claims that incriminating evidence was admitted against him in violation of his Fourth Amendment rights. The instant case is civil and equitable, not criminal; and it involves materials jealously protected by the First Amendment. Those materials are neither contraband nor evidence, never having been adjudicated obscene. Petitioners, therefore, had no right of pos-

session in the materials and the District Court properly ordered they be returned to their rightful owners, the Respondents. That order was based on the equitable powers of the Court granted by the statute involved, 42 USC, 1983.

It is Respondents' position that Petitioners have grossly misstated the issue herein so as to ignore obvious First and Fourteenth Amendment aspects of the case.

The Court has previously recognized the favored position of First Amendment rights and the "heavy presumption" against the constitutionality of prior restraints of those rights. *Bantam Books v. Sullivan*, 372 U.S. 58, p. 70; 83 S. Ct. 631, p. 639; 9 L.Ed.2d 584, p. 593. There can be no denying that Petitioners' action herein constituted a prior restraint. They attempt, however, to remove this case from its proper First Amendment context by proposing that this Court's ruling in the *Kansas* case applies only to situations involving an illegal seizure, and, further, that no seizure occurred in this instance. (Footnote, p. 6 of the Petition.) Respondents deny both propositions.

The *Kansas* case addresses itself to procedures other than seizures:

> "We conclude that the procedures followed in issuing the warrant for the seizure of the books and authorizing their impounding pending hearing, were constitutionally insufficient because they did not adequately safeguard against the suppression of nonobscene books." (378 U.S. at 208, 84 S. Ct. at 1724, 12 L.Ed.2d at 811.)

This Court based that decision in part upon its holding in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 77 S. Ct. 1325, 1 L.Ed.2d 1469, in which an injunctive procedure was upheld. This Court has since struck down unreasonable school regulation of First Amendment rights. *Tinker v. Des Moines*, 393 U.S. 503, 89 S. Ct. 733, 21 2 Ed.2d 731, and censorship statutes which do not provide procedural safeguards (*Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct . 734, 13 L.Ed.2d 649). It seems clear from these precedents that

the lower Court's decisions in this matter do not hinge on the finding of a seizure, but, rather, on the lack of procedural due process in impounding the Respondents' copy materials, thereby preventing publication of the newspaper.

In support of its notion that no seizure occurred, Petitioners rely on the following Fourth Amendment cases: *Davis v. United States*, 413 F.2d 1226 (C.A. 5); *Sartain v. United States*, 303 F.2d 859 (C.A. 9); *United States v. Eldridge*, 302 F.2d 463 (C.A. 4); *United States v. Haden*, 397 F.2d (C.A. 7); *United States v. Mazzella*, 295 F. Supp. 1033 (S.D. N.Y.).

Three of these cases are contrary to Petitioners contention. In *Eldridge*, *Mazzella* and *Sartain*, the Courts specifically found that *searches* occurred, but were rendered reasonably by the consent of the bailees in possession of the incriminating evidence. In *Davis*, the Court held that recording of an incriminating telephone conversation was not a *search*. No issue of *seizure* was presented.

Haden appears to be the most formidable of Petitioners' cases. The Court held therein that no seizure occurred when an undercover government agent (not merely a bailee) took illegal drugs from defendant's car at the direction of the defendant. The Court cited *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L.Ed.2d 576:

> "One who intends a conversation or transaction to be private and takes reasonable steps to keep it private is protected from government intrusion unauthorized by warrant or well-defined special circumstances."

The record herein reveals that the materials were delivered to the printer only to be printed, under an agreement which had been in force for several prior issues. Upon learning of the printer's duplicity, Respondents immediately protested and demanded the return of the materials, asserting their prepublication copyright. These facts support the lower Court's findings in this case in that Respondents intended the privacy of the transaction and took reasonable steps under the circumstances to assure it. The violation by Peti-

tioners of Respondents' expectations of privacy in their dealing with their printer and the resulting impounding of their copy materials constituted a seizure under the *Haden* rationale.

This Court has held that each case involving the question of illegal seizure be judged on its own particular facts. (*Lewis v. United States*, 385 U.S. 206, 87 S. Ct. 424, 17 L.Ed.2d 312.) We submit the facts in the instant case are entirely different from those in the cases cited by Petitioners, that the issue presented is other than as framed by Petitioners and that no split of authority is created by the decision below.

II. THE DECISION BELOW PRESENTS NO PROBLEM TO LAW ENFORCEMENT OFFICERS ENGAGED IN THE LAWFUL GATHERING OF EVIDENCE.

Petitioners allege the holding below has caused a significant, widespread and deleterious effect on justice and the public by eliminating "another" common method of gathering evidence. They ignore completely the First Amendment aspects of this case and hope, thereby, to evade the clear requirements of the *Kansas* case.

CONCLUSION

For the reasons above stated, the Petitioners' Application for Writ of Certiorari should be denied.

Respectfully submitted,

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